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No. 81-2355

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

IONIAN GLOW MARINE, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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This case presents the question whether *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977), or *Weyerhaeuser Steamship Co.* v. *United States*, 372 U.S. 597 (1963), controls a private shipowner's right to collect contribution from the United States for damages paid to servicemen injured in a maritime collision. Respondent has asserted (Br. in Opp. 9-12) that the apparent inconsistency between those two cases does not exist, because the government's liability is required (independently of *Weyerhaeuser*) by 46 U.S.C. 783 and by this Court's deci-

sion in *United States* v. *The Thekla*, 266 U.S. 328 (1924). These arguments are without merit. Respondent alternatively argues that *Weyerhaeuser* controls apportionment of damages in all maritime collision cases (Br. in Opp. 4-8, 12-14). This *ipse dixit* merely reenforces the tension that the government has asked this Court to resolve.

1. Respondent claims that *Stencel Aero* is inapplicable because it rests on principles of sovereign immunity, and Congress has waived the immunity of the United States by authorizing counterclaims against the government in Section 3 of the Public Vessels Act, 46 U.S.C. 783 (Br. in Opp. 9-10). Respondent also argues that the government "inherently waives" sovereign immunity, under the rule of *The Thekla*, *supra*, whenever it presses affirmative claims for relief in admiralty (Br. in Opp. 10-12). These contentions misapprehend the nature of sovereign immunity.

Sovereign immunity may be waived either generally or to a limited degree. See *United States* v. *Shaw*, 309 U.S. 495, 502-503 (1940). Congress' decision to waive sovereign immunity for purposes of subjecting the United States to suit under the Public Vessels Act [1] hardly entails a waiver of sovereign immunity to claims for contribution for damages paid to members of the armed forces. A comparison with the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, is instructive. In that Act Congress waived sovereign immunity to suits (including actions for indemnity) sounding in tort. But as this Court recognized in

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[1] The history and scope of that waiver of immunity are discussed in *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164 (1976), and *American Stevedores, Inc.* v. *Porello*, 330 U.S. 446, 450-454 (1947).

Feres v. *United States*, 340 U.S. 135 (1950), and *Stencel Aero*, that waiver alone did not determine the distinct question whether Congress had waived immunity to claims arising from injuries the government may have caused to members of the armed forces.[2] Those cases exemplify this Court's frequent admonition that waivers of sovereign immunity must come from Congress, and must be clearly and unequivocally expressed. See, *e.g.*, *United States* v. *Testan*, 424 U.S. 392, 399 (1976); *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941).

Similarly, *The Thekla* (decided before enactment of a comprehensive statutory scheme in the Public Vessels Act) held only that the United States, when it affirmatively invoked the court's jurisdiction by filing a libel, subjected itself to claims arising out of the same events. The decision did not address the items that might be included as damages in such a cross-libel. Indeed, in *United States* v. *Shaw*, *supra*, 309 U.S. at 503, this Court declared that the decision in *The Thekla* did not "indicate an intention to permit generally unlimited cross-claims."

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[2] Respondent's argument suggests that 46 U.S.C. 783 is a waiver of sovereign immunity that is somehow more generous than the one in Section 1 of the Public Vessels Act, 46 U.S.C. 781. In fact, the general waiver of immunity applicable to all claims under the Act is found in Section 1. That section creates a cause of action "for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided*, That the cause of action arose after the 6th day of April 1920." Section 3, by contrast, simply authorizes the procedural device of filing cross-libels, setoffs, and counterclaims in libels filed by the United States, and directs that the cross-libellant shall post security.

2. Although it argues that no unsettled question is raised because *Weyerhaeuser* simply controls apportionment of damages in all maritime collision cases (Br. in Opp. 4-8, 12-14), respondent implicitly underscores the apparent inconsistency between that case and *Stencel Aero Engineering Corp.* v. *United States, supra,* as applied to mutual fault collisions resulting in injuries to military personnel. Nowhere does respondent explain how following *Weyerhaeuser* can be squared with the limitation of liability that *Stencel Aero* (431 U.S. at 673) found in the Veterans' Benefits Act, 38 U.S.C. 301 *et seq.* Nor does respondent explain why permitting third parties to recover from the United States in this situation will not disrupt the "peculiar and special relationship of the [serviceman] to his superiors * * *." *United States* v. *Brown,* 348 U.S. 110, 112 (1954); *Feres* v. *United States, supra,* 340 U.S. at 141-143. Finally, respondent's reliance on *Weyerhaeuser* offers no reason why that "distinctively federal" relationship (*Stencel Aero Engineering Corp.* v. *United States, supra,* 431 U.S. at 671)—which precludes actions for contribution when servicemen are injured on land or in the air—should not be equally significant in the case of servicemen injured at sea.

Respondent assumes (Br. in Opp. 7-8) that because the divided damages rule prevailed in *Weyerhaeuser* over the exclusive liability provision in the Federal Employees' Compensation Act, 5 U.S.C. 8116(c) ("FECA"), it equally overcomes *Stencel Aero's* rule against contribution for damages paid to servicemen. But the decision in *Weyerhaeuser* rested on considerations inapposite here. The Court there found "no evidence whatever [in the legislative history of the FECA] that Congress was concerned with the rights of unrelated third parties, much less of any

purpose to disturb settled doctrines of admiralty law * * *." *Weyerhaeuser Steamship Co.* v. *United States, supra*, 372 U.S. at 601. The FECA was originally enacted in 1916, long after the rule of divided damages in mutual fault collisions had become a fixture of admiralty law. In this case, by contrast, that "settled doctrine of admiralty law" confronts a limitation on the government's liability that has equally ancient roots. "We know of no American law which ever has permitted a soldier to recover for negligence, against * * * the Government he is serving." *Feres* v. *United States, supra*, 340 U.S. at 141.[3] Moreover, whatever might be the rights of "unrelated third parties" under the FECA, *Stencel Aero* found in the Veterans' Benefits Act a clear intent to bar third-party claims for contribution or indemnity, and to cloak the United States in " 'the protective mantle of the Act's limitation-of-liability provisions' " (431 U.S. at 673).[4]

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[3] Not only is there no universal principle compelling the apportionment of damages paid to injured members of the armed forces, but Article 4 of the Brussels Collision Liability Convention of 1910 (*reprinted in* 6 *Benedict on Admiralty* 3-12 (7th ed. 1982)), on which this Court relied in part in *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 403-404 (1975), provides that:

> It is left to the law of each country to determine, as regards such recourse, the scope and effect of any legal or contractual provisions which limit the liability of the owners of a vessel toward persons on board.

[4] Respondent suggests (Br. in Opp. 8) that *Stencel Aero* is simply inapposite because that case involved the government's derivative tort liability to injured members of the armed forces, whereas admiralty's divided damages rule may be said to describe a duty running between two shipowners themselves to share all damages incurred as a result of mutual fault. See *Weyerhaeuser Steamship Co.* v. *United States*,

There is no formula that dictates that ordinary maritime rules must always prevail in maritime cases notwithstanding the identities of the parties involved. Rather, "it is the duty of this Court to attempt to fit the Public Vessels Act, as intelligently and fairly as possible, 'into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole.' " *Johansen* v. *United States*, 343 U.S. 427, 432 (1952), quoting *Feres* v. *United States*, *supra*, 340 U.S. at 139.

3. Although we believe that the court of appeals erred and that its decision has potentially significant effects, it would be prudent for this Court to withhold decision on the petition in this case pending disposition of *Lockheed Aircraft Corp.* v. *United States*, cert. granted, No. 81-1181 (Apr. 5, 1982). The petitioner in *Lockheed* has urged that the holding in *Weyerhaeuser* extends to all third-party claims under the Federal Tort Claims Act (81-1181 Pet. Br. 31-34). As respondent correctly notes (Br. in Opp.

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supra, 372 U.S. at 602-603. But reliance on that argument here not only ignores the critical differences already noted between *Weyerhaeuser* and *Stencel Aero*; it also elevates form over substance in an area where it is least appropriate. The damages at issue resulted from negligence claims filed by servicemen against Ionian Glow; it is clear that those claims could not have been brought directly against the United States (Pet. 3, 6). This Court refused to allow such claims to be brought indirectly against the government in *Stencel Aero*, in part because of its concern not to interfere in an " 'area of governmental activity' " where courts have the " 'le[ast] competence' " (*Rostker* v. *Goldberg*, 453 U.S. 57, 65 (1981), quoting *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973)). That interference (see Pet. 8) is no less tangible when the damages a shipowner collects are denominated part of the government's "direct" liability to a joint tortfeasor than when they are called a "derivative" claim.

14), the government has argued in *Lockheed* that *Weyerhaeuser* does not apply to non-maritime claims; thus, even if one assumed that the Fourth Circuit decided this case correctly, it would not undermine the government's position in *Lockheed*. But disposition of *Lockheed* will almost certainly require this Court to reevaluate its decision to allow apportionment of damages in cases such as *Weyerhaeuser*, and the outcome of the reevaluation could bear appreciably on the application of *Weyerhaeuser* to this case. For the same reason, any analysis of *Weyerhaeuser* in the parties' briefs on the merits in this case could be superseded by this Court's decision in *Lockheed*.

CONCLUSION

The Court should hold the petition in abeyance pending its decision in *Lockheed Aircraft Corp.* v. *United States*, No. 81-1181.

Respectfully submitted.

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